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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-5262

****

ERNEST RAY SIMMONS

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

****

ON WRIT OF CERTIORARI

TO THE

SUPREME COURT OF NORTH CAROLINA

RESPONSE OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 286 N. C. 681, 213 S. E. 2d 280 (1975), and is appended to Petitioner's Petition as Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 USC §1257(3).

QUESTIONS PRESENTED

I. WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER IN THE FIRST DEGREE UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

II. WHETHER THE EXCLUSION FOR CAUSE OF THREE VENIREMEN ON THE GROUNDS OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED THE PETITIONER'S RIGHTS UNDER THE SIXTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

III. WHETHER THE ADMISSION OF A LAW ENFORCEMENT OFFICER'S RECAPITULATION OF PETITIONER'S ORAL CONFESSION VIOLATED PETITIONER'S RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM, GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, TO BE FREE FROM COMPULSORY SELF-INCRIMINATION, GUARANTEED BY THE FIFTH AMENDMENT AND TO BE AFFORDED DUE PROCESS OF LAW, GUARANTEED BY THE FOURTEENTH AMENDMENT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

II. In addition to the statutes cited by the petitioner in his Petition for Writ of Certiorari the following provision is applicable in this case:

N.C.G.S. §7A-457(c):

> "An indigent person who has been informed of his right to be represented by counsel at any out-of-court proceeding, may, either orally or in writing, waive the right to out-of-court representation by counsel."

STATEMENT OF CASE

Petitioner, Ernest Ray Simmons, was tried and convicted of first degree murder at the June 10, 1974. Criminal Session, Nash County Superior Court, in Nash County, North Carolina. Petitioner appealed his conviction to the North Carolina Supreme Court, which, in its Opinion filed 14 April 1975, affirmed petitioner's conviction and death sentence. Petitioner now seeks review in this Court upon Petition for Writ of Certiorari to review the judgment of the Supreme Court of North Carolina.

STATEMENT OF FACTS

The State-respondent adopts as its own as if fully set out herein the facts as stated by the North Carolina Supreme Court at pages 282-284 of its Opinion in State v. Simmons, supra, a copy of which is appended to petitioner's petition as Appendix A.

ARGUMENT

I. THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

There is no valid reason for the Court to grant certiorari to presently hear this question. This Court in the case of Fowler v. North Carolina, No. 73-7031 (October term, 1974) granted certiorari to petitioner Jesse Thurman Fowler to hear this identical question. Extensive briefs were submitted in that case and oral arguments were made before this Court on April 21, 1975. Reargument has been scheduled for the October, 1975 term of this Court. This question therefore has been presented to the Court, has been accepted for hearing by the Court, oral arguments before this Court have already been made, and further arguments are to be made. Hence, any decision in this case should be dependent upon the outcome of the Fowler case, and the petition to grant certiorari should be denied.

II. THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF THREE VENIREMEN ON THE GROUNDS OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. The Test of Exclusion Applied by the Court Below Met the Minimum Standards Required by the Constitution as Construed in Witherspoon v. Illinois, 391 U.S. 510 (1968).

There is no valid reason for the Court to grant certiorari to hear this question. The case of Witherspoon v. Illinois, 391 U.S. 510 (1968), establishes two things: (1) veniremen may not be challenged for cause because they voice general objection to the death penalty or express conscientious or religious scruples against this infliction; and (2) veniremen who are unwilling to consider all of the penalties provided by law and who are irrefutably committed,before the trial has begun, to vote against the death penalty regardless of the facts or circumstances that might emerge during the course of the trial, may be challenged for cause on that ground. In Witherspoon, footnote 21 at p. 522, this Court said:

> "...nothing we say today bears upon the power of a state to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear: (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitudes toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt."

A contextual examination of those portions of the voir dire examination quoted in the petition in this case discloses that the excluded jurors stated that they were irrevokably committed to vote against a verdict requiring the imposition of the death penalty, without regard to what the evidence might show. The trial court correctly ruled,and the North Carolina Supreme Court correctly affirmed, that these jurors had made up their minds before the trial began. The question is one of the application of settled law to familiar facts and it is not sufficiently important to require review.

Moreover, the State denies that the cases cited in the Petition for Writ of Certiorari [People v. Speck, 41 Ill. 2d 177, 242 N.E. 2d 208 (1968), rev'd per cur. sub nom. Speck v. Illinois, 403 U.S. 946 (1971); State v. Mathis, 52 N.J. 238, 245 A. 2d 20 (1968), rev'd per cur. sub nom. Mathis v. New Jersey, 403 U.S. 946 (1971); Jaggers v. Commonwealth, 439 S.W. 2d 580, 585 (Ky. Ct. App. 1968), rev'd per cur. sub nom. Jaggers v. Kentucky, 403 U.S. 946 (1971); State v. Adams, 76 Wash. 2d 650, 458 P. 2d 558, 576 (1969), rev'd per cur. sub nom. Adams v. Washington, 403 U.S. 947 (1971); Harris v. Texas, 403 U.S. 947 (1971), rev'g 457 S.W. 2d 903 (Tex. Ct. Crim. App. 1970) (sub nom. Harris v. State)] stand for the proposition advanced by the petitioner, i.e., that a Witherspoon determination may not be made about a particular prospective juror from his entire voir dire examination considered contextually.

B. The Exclusion of Veniremen with Conscientious Scruples Against Capital Punishment Did Not Deprive the Petitioner of a Sixth Amendment Right to a Representative Jury.

In order to avoid subjecting the Court to redundant argument, the State adopts Argument II as if fully set out herein of the Response of State of North Carolina to Petition for Writ of Certiorari to the Supreme Court of North Carolina, Ward v. North Carolina, No. 74-6263 (filed April 24, 1975) at pp 6-8 (attached as Appendix A, infra).

III. THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE ADMISSION OF A LAW ENFORCEMENT OFFICER'S RECAPITULATION OF PETITIONER'S ORAL CONFESSION VIOLATED PETITIONER'S RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM, GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, TO BE FREE FROM COMPULSORY SELF-INCRIMINATION, GUARANTEED BY THE FIFTH AMENDMENT AND TO BE AFFORDED DUE PROCESS OF LAW, GUARANTEED BY THE FOURTEENTH AMENDMENT.

There are no valid reasons for the Court to grant certiorari to pass upon these questions. In essence, the petitioner objects to the admission into evidence of his confession because it was based on a composite story. The petitioner contends that his statement and that of Frank James Silver were commingled in Sheriff Womble's notes, and, thus, the Sheriff's version of his confession is not an accurate representation of what he actually related. Moreover, since Silver did not testify at the trial and since the inculpatory portions of the confession may have been provided by Silver, the petitioner asserts that he was denied his Sixth Amendment right to be confronted with the witnesses against him. However, this assertion is belied by the facts. The record discloses that on December 20, 1973, the petitioner made his rather extensive inculpatory statement in the absence of Silver. R pp 79-82 and 89-91. The subsequent statements offered by the petitioner were essentially the same as those offered on December 20, 1973. R p 93. Accordingly, it appears that the confession of the petitioner as related to the jury by Sheriff Womble was developed (except for "a few more details",R p 93) in a meeting between the petitioner and the sheriff at which Frank James Silver was not even present. Therefore, the claim that this is a "composite story" is spurious. There was no reason for the petitioner to be confronted with Frank James Silver as he was, in point of fact, not a witness against him. Quite simply, the petitioner was confronted with his own inculpatory remarks. Hence, there is no need for the Court to grant certiorari to consider this question.

The petitioner also makes the rather perplexing argument that the admission of the confession into evidence violated his Fifth Amendment right to remain silent in the face of interrogation. Once again, however, this argument is belied by the facts. The record shows the following statement of the Miranda warning given to the petitioner by Sheriff Womble on December 20, 1973:

> "I told him I wanted to talk to him about the death of Mrs. Powell; told him that the law required me to warn him of his rights; he did not have to make any statements, other than what he had given me, his name and his address. Told him that anything that he did make could and would be used against him in court; that he had a right to an attorney if he wanted one, of his own choosing; and if he wanted one and wasn't able to afford one that one would be appointed him before any questions was asked, or during questioning. I also told him that if he decided to make any statements or answer any questions that he had a right to quit talking at any time he wanted to; and I asked him if he understood his rights and he said he did. I asked if he understood what I had said to him. He said he did. I asked him if he wanted a lawyer now. He said he did not. I asked him if he wanted to make some statements. He said he did."
> (Emphasis supplied) R p 80.

Thus, it is quite clear that the petitioner was apprised of his right to remain silent. The fact that he did not exercise this right surely cannot be blamed on the State. The petitioner was not intimidated nor threatened nor was he promised anything in exchange for his statement. R pp 81-82.

But the petitioner now contends that he was penalized for remaining silent during interrogation. The record clearly demonstrates that on December 20, 1973 he did not choose to remain silent:

> "Ernest never hesitated at all. He talked very freely and right on out...In fact, we didn't ask him but a very, very few questions. He did most of the talking and was very, very frank." R p 81.

The State submits that the reasons proffered by the petitioner for granting tne Petition for Certiorari in this regard are totally devoid of merit and should be dismissed out of hand.

CONCLUSION

Based on the aforementioned reasons, the State-Respondent respectfully submits that certiorari be denied.

Respectfully submitted this the 8th day of September, 1975.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing RESPONSE OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on petitioner by depositing the same in the United States Mail addressed to the following persons:

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This the 8th day of September, 1975.

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APPENDIX A

Pp 6-8, Response of State of North Carolina to Certiorari to the Supreme Court of North Carolina, Ward v. North Carolina, No. 74-6263 (filed April 24, 1975).

I. THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF RAPE WHEN THE LAW OF NORTH CAROLINA REQUIRES THAT WOMEN FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

There is no valid reason for the Court to grant certiorari at this time to hear this question. This Court in the case of Fowler v. North Carolina, No. 73-7031 (Oct. Term, 1974) granted certiorari to Petitioner Jessie Thurman Fowler to hear this identical question. Extensive briefs were submitted in that case and oral arguments were made before this Court on April 21, 1975. This question therefore has been presented to the Court, has been accepted for hearing by the Court and oral arguments before this Court have already been made. Therefore, any decision in this case should be dependant upon the outcome of the Fowler case, and the petition to grant certiorari should be denied.

II. THE EXCLUSION FOR CAUSE OF EIGHTEEN VENIREMEN ON THE GROUND OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY DID NOT VIOLATE PETITIONER'S RIGHTS UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY DEPRIVING HER OF A REPRESENTATIVE JURY SELECTED FROM A FAIR CROSS-SECTION OF THE COMMUNITY.

Petitioner contends that the examination of eighteen veniremen with respect to the veniremen's expressed attitude towards returning a verdict which involved the death penalty lead to improper exclusion of jurors.

The case of Witherspoon v. Illinois, 391 US 510, 83 S.Ct. 1770, 20 L.Ed. 2d 776 (1968), establishes two things: (1) veniremen may not be challenged for cause simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction; and (2) veniremen who are unwilling to consider all of the penalties provided by law and who are irrefutably committed before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge during the course of the trial,

may be challenged for cause on that ground. In Witherspoon v. Illinois, 391 US 510, this Court said:

> "The only justification the State has offered for the jury-selection technique it employed here is that individuals who express serious reservations about capital punishment cannot be relied upon to vote for it even when the laws of the State and the instructions of the trial judge would make death a proper penalty. But in Illinois, as in other states, the jury is given broad discretion to decide whether or not death is 'the proper penalty' in a given case, and a juror's general views about capital punishment play an inevitable role in such decision."

This language from Witherspoon reflects an important ground of the reasoning in that case...a line of argument that is no longer applicable in North Carolina following the decisions of this Court in Furman v. Georgia, 408 US 238 (1972), and the Supreme Court of North Carolina in State v. Waddell, 282 NC 431, 194 SE 2d 19 (1973). North Carolina jurors no longer decide whether death is "the proper penalty", for the law now requires that the penalty of death be adjudged for the enumerated crimes.

While petitioner's argument that "identifiable segments of the community [cannot be systematically excluded from jury panels]" correctly states the law, that proposition is not exactly in keeping with the principles stated by this Court in Witherspoon.

> "...nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear: (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, supra., footnote 21 at p. 522.

Such veniremen as were excluded, although they may constitute an identifiable segment of the community, have no place on a jury, the sole function of which is find guilt or innocence. Their views respecting the propriety of the death penalty are a

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main irrelevancy when the penalty is set by the law, and the jury has no discretion to set the penalty. All that happened in this case, is that the Court said that none of the eighteen veniremen could be excluded. The question, therefore, is one of the application of settled law to familiar facts and is not sufficiently important to review.

The right guaranteed by the Sixth Amendment is a right to a trial by an impartial jury; and it is this right which applies to the State by the due process clause of the Fourteenth Amendment. Duncan v. Louisiana, 391 US 145, 20 L.Ed. 2d 491. Except where racial exclusion is involved, an impartial jury means only a neutral one. Fay v. New York, 332 US 261, 91 L.Ed. 2043. Only juries which are prejudiced, Shepherd v. Maxwell, 384 US 333, 16 L.Ed. 2d 600; Witherspoon v. Illinois, 391 US 510, 20 L.Ed. 2d 776, or partially or mentally incompetent, U.S. ex rel Lequillou v. Davis, 115 F. Supp. 392 (D.C. vi 1953) do not meet this standard. The "broad cross-section" or "truly representative cross-section" requirements appearing in many Federal cases are not constitutionally mandated, Salisbury v. Grimes, 406 F. 2d 50, (5th Cir. 1969); Christian v. Maine, 404 F. 2d 205 (1st Cir. 1968); and in order to fulfill constitutional requirements the States are only required to utilize a cross-section suitable in character and intelligence. Brown v. Allen, 344 US 443, 97 L.Ed. 469. Under Witherspoon then, a veniremen should be willing to consider all the penalties which are provided by State law and he should not be irreparably committed before the trial has begun to vote against the death penalty regardless of any circumstances and facts which might be later introduced into evidence. Accord Boulden v. Holman, 394 US 478, 22 L.Ed. 2d 433, 89 S.Ct. 1138 (1969).

III. WITHERSPOON V. ILLINOIS, 391 US 510 (1968) DOES NOT REQUIRE THAT A VERBATIM TRANSCRIPT BE KEPT OF THE VOIR DIRE EXAMINATION OF PROSPECTIVE TRIAL JURORS IN A CAPITAL CASE.

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